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China Codifies. The First Book of the Civil Code  
between Western Models to Chinese Characteristics  
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## China Codifies

### The First Book of the Civil Code between Western Models to Chinese Characteristics

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#### ABSTRACT

On 15 March 2017 the first book of the Chinese Civil Code, whose definitive processing is scheduled for 2020, has been approved. This is a long-awaited achievement, whose starting point dates back to the early twentieth century, when the first draft of a Civil Code inspired by European models was prepared. The project of Civil Code in China has been part of a long lasting and complex process of legal reforms characterized by a vast circulation of foreign legal models, especially in the last few decades, and at the same time, by the emerging of the issue of local identity and cultural differentiation. The making of the Civil Code, the Western model par excellence for legal reforms, thus represents an interesting observatory of the evolution of the dynamics of the relations between local and foreign elements. This will be the main line of reflection along which this study will be developed.

#### KEYWORDS

Chinese Civil Code – German Civil Code Model – Legal Transplants – Western Legal Tradition – Chinese Characteristics

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## 1. Introduction

On 15 March 2017, during the 5<sup>th</sup> Session of 12<sup>th</sup> National People's Congress, the General rules of civil law<sup>1</sup> were approved, taking effect on 1 October 2017. This is the first book of the Chinese Civil Code, whose definitive processing is scheduled for 2020<sup>2</sup>, when the remaining books will be approved. The draft of the following books, namely the “Special parts of the Civil Code”, were presented to the Legislative commission of the National People's Congress on 27 August 2018 and published in September 2018<sup>3</sup>.

The General rules of civil law (GRCL) is a long awaited achievement, the outcome of a complex historical trajectory, whose starting point dates back to the early twentieth century, when the first draft of a Civil Code inspired by European models, first of all the German one, was presented to the Chinese Emperor as an urgent step to be taken in order to start the modernization of China and, at the same time, save the Empire from collapse. This historical trajectory is, as of now, still moving towards a not quite reached landing place.

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<sup>1</sup> The People's Republic of China General rules of civil law (中华人民共和国民法总则, *Zonghua renmin gongheguo minfa zongze*) was approved with 2,782 votes in favor, 30 against, 21 abstained.

<sup>2</sup> As specified by Li Shishi (Chairman of the Legislative Affairs Committee of the Standing Committee of the National People's Congress): L. Shishi, 关于中华人民共和国民法总则(草案)的说民, *Guanyu zhonghua renmin gongheguo minfa zongze (caoran) de shuoming (Explanations on the project of the General Civil Law Section of the People's Republic of China)*, which can be read at the web site [www.xinhuanet.com/2017-03/09/c\\_129504877.htm](http://www.xinhuanet.com/2017-03/09/c_129504877.htm).

<sup>3</sup> The Draft of the Special parts of the Civil Code (民法典各分编草案, *Minfadian gefenbian cao'an*), has been published on the website: [www.npc.gov.cn](http://www.npc.gov.cn).

The first book of the Code presents a series of elements that stand in continuity with the historical outline within which the secular process of Chinese codification has been developing: the hypotactic code model of German derivation together with some paradigmatic elements of that model, first of all the category of the juristic act, remain a cornerstone of the Chinese civil law. However, this continuity has to be framed in the context of a long lasting and complex process of legal reforms characterized by a vast circulation of foreign legal models, especially in the last few decades, and at the same time, by the emerging of the issue of local identity and cultural differentiation raised, first of all, by the Chinese leadership.

As a matter of fact, legal transplants always involve a degree of cultural adaptation, a process of “domestication”, so to speak, and the various component of a legal system – the “different legal formants” in Sacco’s terminology<sup>4</sup> – may react in different ways to the influences implied in legal transplants. The making of a Civil Code, the Western model par excellence for legal reforms, is an interesting observatory of the evolution of the dynamics of the relations between local and foreign elements. This will be the main line of reflection along which this study will be developed.

After an overview of the process of civil codification in modern and contemporary China, devoting a specific attention to the drafting process of the GRCL, an analysis of the latter is made, focusing on the topic of the influence of Western legal models and the adaptation of these models within the framework of Chinese contemporary civil law. In this framework the notion of the “Chinese Characteristics”, that has been emerging in the last decade as catalyst of national goals and identity, also in the civil law field, deserves a particular attention. Thus, a final reflection will be devoted to this notion and to its possible expression, also beyond the declamations of the programmatic political documents and of the general principles embodied in the legislation.

## 2. No modernization without codification: the long shadow of the Civil Code in modern and contemporary China

The Civil Code represents one of the highest achievements of modern civil law systems, to the point of embodying a quasi-mythological ideal for legal modernity<sup>5</sup>.

<sup>4</sup> R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, in *American Journal of Comparative Law*, 1991, p. 343.

<sup>5</sup> P. Grossi, *Codici: qualche conclusione fra un millennio e l'altro*, in P. Cappellini & B. Sordi (eds.), *Codici. Una riflessione di fine millennio*, Giuffrè, Milano, 2002, p. 580.

It has been so within Europe, where the great models of Civil Codes were created; it has been so, without the European borders and beyond the Western world, for the vast majority of countries that, to enter the modern world, set forth on the path of civil law.

This is what also happened in the case of China: within the legal reforms that were the last act of the Imperial government before its fall, there was a project for a Civil Code, *i.e.* the 1911 Project of the Civil Code of the Great Qing Dynasty<sup>6</sup>, destined, as written in the Project's Presentation Memorial, to pave the way to modern law reforms in the wake of the great civil law tradition stemming from Roman law.<sup>7</sup> Thus, civil law, with its two most representative expressions, the Napoleonic code and German legal science, likewise became for China, between the nineteenth and the beginning of twentieth century, a prestigious, exemplary legal model to be followed in order to achieve modernity<sup>8</sup>.

After a first and a second Draft of the Civil Code, which did not take effect, due to the collapse of the Qing and the political chaos that subsequently plagued the country, the first Civil Code of modern China was enacted in 1929-1930, under the Republic of China, born after the dissolution of the Empire and ruled by Guomindang<sup>9</sup>. For this code, the most relevant models of reference were, first of all the German Civil Code (BGB) and the Japanese Civil Code (also modelled after BGB), with some elements deriving from the Swiss Law of Obligations and the French Civil Code<sup>10</sup>.

These were the first steps of an epoch making process, the first points in a path of legal modernization marked by a complex game of continuity and discontinuity.

In the decades after the enactment of the 1929-30 Civil Code the sign of discontinuity seems to have been dominant, mainly due to the political events marking Chinese history in the XX century. The foundation, in 1949, of the People's Republic of China led to the abrogation of all the laws enacted in the 1930s, under the Guomindang government, and opened a new stage of legal development in which, after two attempts of codifica-

<sup>6</sup> The Project of the Civil Code of the Great Qing Dynasty, 大清民律草案 (*Da qing minlu cao'can*), consisted in five books of which the first three (general part, law of obligations, real rights) followed the setting of the corresponding books of the Japanese Civil Code and its European models of reference, while the last two (family law and succession law) were written under the auspices of the Ministry of Rites (礼部, *Libu*), with the declared intention of preserving the core of Chinese cultural values in the context of legal modernization. On this code see Honglie Yang (杨鸿烈), *中国法律发达史* (*Zhongguo falu fada shi*) [*The History of Chinese Law*], China University of Political Science and Law Press, Beijing, 2009, p. 506.

<sup>7</sup> The Memorial was presented by Liu Yansan, Grand Commissioner for Codification and was published in the Collection *Materials on constitutionalism in the late Qing dynasty* (清末筹备立宪档案史料, *Qingmo choubei lixian dang'an shiliao*), Department of Archives on the Ming and Qing dynasties, China's Press, Beijing, 1979, Vol. 2, pp. 833-834.

<sup>8</sup> In the wake of Japan, which adopted a Western style Civil Code in 1898. As it is well known, between the end of nineteenth and the first half of the twentieth century, civil law had been a great protagonist of processes of legal transplants by prestige. On prestige as a driving cause of legal imitations see R. Sacco, *cit.*, p. 398.

<sup>9</sup> See Civil Code of the Republic of China (中华民国民法, *Zhonghua minguo minfa*), published in *Complete Book of the Six Laws* (六法全书, *Liufa quanshu*), Huiwentan New Bookstore, Shanghai, 1932, pp. 1-221.

<sup>10</sup> T.-F. Chen, *Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution*, in *National Taiwan University Law Review*, 2011, p. 400.

tion made between the end of the 1950s and the beginning of the 1960s<sup>11</sup>, both suddenly aborted, the topic of the Civil Code disappeared in the following two decades, which were traversed by a growing antilegalitarian wave.

However, the path set down in the first phase of the process of legal modernization, with the entry of Western models and the creation of a new taxonomy of law derived from these models, remained open in the less superficial layers of the historical process, maintaining a line of continuity in it. Thus, notwithstanding its recession in the background between the 1960s and 1970s, the Civil Code and its pivotal role for legal development kept projecting a long shadow in the imaginary and the strategic plans of Chinese reformers and in the cultural background of Chinese law scholars. Since 1978, the starting year of Deng Xiaoping's new deal, the Civil Code has re-emerged as a part of the new strategy of development of the Chinese government.

The new project for a Civil Code started in 1979, at the very beginning of the economic reform, but it was suddenly abandoned and replaced by the enactment in 1986 of the General Principles of Civil Law (GPCL), which have been rightly defined as a "truncated Civil Code"<sup>12</sup>.

A more systematic drafting effort was carried on in March 1998 when Wang Hanbin, Vice Chairman of the National People's Congress (NPC), re-started the process of codification appointing a Group for the Redaction of the Civil Code, mainly composed by well-known civil law scholars.<sup>13</sup> In April 2002 the group presented, for public comment, a draft of the Civil Code that was widely reformulated by the Commission of Legislative Affairs of the NPC Standing Committee and then discussed during the thirty-first session of the NPC Standing Committee on 23 December 2002. However, this project, after its presentation to the Standing Committee, disappeared from the scene subsequent to leadership turnover<sup>14</sup> and no further official steps followed.

In the 2003 legislative plan of the NPC there was no mention of the Civil Code, while the drafting work of the Real Rights Law was highlighted. This law, was approved in 2007 and then the Tort Law and the Law on the Applications of Laws to Civil Relations with Foreign elements followed in 2009 and 2010. These three acts, combined with the aforementioned General Principles of Civil Law (1986), the Contract Law (1999), the Marriage Law (1980,

<sup>11</sup> The two projects were drafted following the Soviet model. For a description of the context and the works for the drafting of the code until the enactment of the GPCL see Rou Tong, *The General Principles of Civil Law: Its Birth, Characteristics, and Role*, in *Law and Contemporary Problems*, 1989, p. 152.

<sup>12</sup> S. Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, in *Northwestern Journal of International Law & Business*, 1999, p. 386. The General Principles of Civil Law 中华人民共和国民法通则 (*Zhonghua renmin gongheguo minfa tongze*) have been approved by the 4<sup>th</sup> session of the 6<sup>th</sup> National People's Congress.

<sup>13</sup> On this group see *infra* next para.

<sup>14</sup> The leadership transition was formalized in November 2002 by the 16<sup>th</sup> National Congress of the Chinese Communist Party, which defined the succession of Hu Jintao to Jiang Zemin as Party General secretary and was followed by the institutional transition during the 2003 National People's Congress.

revised 2001), the Succession Law (1985), the Adoption Law (1991, revised 1998), and the Civil Procedure Law (1991, revised in 2007 and 2012) completed the overall framework of private law created by following a piecemeal approach that was preferred to the more complex work of codification.

After more than ten years in which the topic of a Civil Code remained in the wings, under the new leadership of Xi Jinping and Li Keqiang, a new strong emphasis has been put on legal reforms with the approval of the Resolution of the Communist Party Central Committee on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China,<sup>15</sup> at the end of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC), held in Beijing from 20 to 23 October 2014.

Following this document, the first document in the history of the Central Committee of the CCP completely devoted to the topic of law, the Civil Code once again became a fundamental part of the political agenda, in connection with efforts to strengthen the rule of law and bring the existing civil legislation into the framework of a system<sup>16</sup>.

### 3. The Drafting of the first book of the Chinese Civil Code: players, strategies and guiding principles

This time a strong acceleration to the codification process was driven by Chinese leaders. The Party's decision was immediately followed by several official initiatives, all directed at working on the draft of the first book of the future Civil Code. On 6 August 2015 the five-year legislation plan of the 12<sup>th</sup> NPC was updated, mentioning the Civil Code<sup>17</sup>. In June 2016, the Commission of Legislative Affairs of the NPC Standing Committee published, for public comment, a first draft of the first book of the Civil Code, named General Rules of Civil Law (民法总则, *Minfa Zongze*), followed by the publication of two other drafts in September 2016 and December 2016<sup>18</sup>. Then, on 8 March 2017 Li Jianguo, Vice Chairman of the NPC Standing Committee, presented the final draft during the annual session of Congress, which approved it a week later.

However, the legislator has not been the only player on the scene of the drafting work.

<sup>15</sup> See 中共中央关于全面推进依法治国若干重大问题的决定 (*Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jue ding*). The full text of the Resolution can be found at the following web address: [news.xinhuanet.com/ziliao/2014-10-30/c127159908.htm](http://news.xinhuanet.com/ziliao/2014-10-30/c127159908.htm).

<sup>16</sup> See the interview of 29 July 2016 to the Vice President of the NPC Law Committee, Xianming Xu (徐显明), 民法典应将宪法权利变为民法权利 (*Minfa dian ying jiang xianfa quanli bian wei minfa quanli*) [*The Civil Code should transform constitutional law rights into civil law rights*] that can be found at the following website address: [www.china.caixin.com](http://www.china.caixin.com).

<sup>17</sup> See People's Daily, 4 August 2015, which can be read at: <http://cpc.people.com.cn/n/2015/0806/c64387-27419988.html>.

<sup>18</sup> The three drafts can be found at the following addresses: [www.npc.gov.cn/npc/lfzt/rlyw/2016-07/05/content\\_1993427.htm](http://www.npc.gov.cn/npc/lfzt/rlyw/2016-07/05/content_1993427.htm); [www.npc.gov.cn/npc/flcazqyg/2016-11/16/content\\_2002106.html](http://www.npc.gov.cn/npc/flcazqyg/2016-11/16/content_2002106.html); [www.npc.gov.cn/npc/flcazqyg/2016-11/18/content\\_2006666.html](http://www.npc.gov.cn/npc/flcazqyg/2016-11/18/content_2006666.html).

Civil law codification is the kingdom of scholars, in particular in those systems that follow the German model and, as a matter of fact, in the last few decades, Chinese scholarship has never stopped working on the project of the Civil Code. Already in the 1986 GPCL, which was the first official act of rebuilding the Chinese private law system from a formal point of view, after the Cultural revolution, we find the hand of the civilians who were among the great fathers of civil law in contemporary China, i.e. Tong Rou, Jiang Ping, Wang Jiafu and Wei Zhengying<sup>19</sup>. Ten years later, when the work of civil codification re-started, the Vice Chairman of the National People's Congress Wang Hanbin appointed a drafting group which mainly comprised well known civil law scholars<sup>20</sup>.

Amongst the most active of them we find Professor Liang Huixing (from the Chinese Academy of Social Sciences) and Professor Wang Liming from Renmin University who, in addition to contribute, in their respective sections<sup>21</sup>, to the work of the Group for the redaction of the Civil Code, drafted their own Projects of the Civil Code, respectively consisting of seven books and 1,924 articles and eight books and over 2,056 articles<sup>22</sup>.

After the approval of the Party's Central Committee's 2014 Resolution, where the Civil Code was once again, with great determination, put at the centre of the political agenda, these scholars resumed their drafting work. Liang Huixing, who had published a second and a third version of his Civil Code in 2011 and in 2013-2014, re-published the first book of the latter on the website of the Chinese Academy of Social Sciences on 18 January 2015<sup>23</sup>, just three months after the Party's Central Committee's Resolution. One year later Professor Sun Xianzhong assumed the direction of the working group at the Chinese Academy of Social Sciences, and published a new draft of the first part of Civil Code<sup>24</sup> for public comment. The second scholarly side that took up the initiative of drafting after the 2014 Resolution, is the China Law Society, which has organized a group of civil law scholars, called "Leading group for the Chinese civil codification", of which the President and the Vice President of said Society, Zhang Mingqi and Wang Liming, have been appointed director and vice director. At the first plenum meeting of this team, Wang Liming proposed the discussion

<sup>19</sup> See R. Tong, cit., p. 152.

<sup>20</sup> See on this group Guodong Xu, *An Introduction to the Structures of the Three Major Civil Code Projects*, in *Tulane European and Civil Law Forum*, 2004, p. 37.

<sup>21</sup> As the CLA divided the work between the main scholars, assigning the drafting of specific parts of civil law to each one.

<sup>22</sup> H. Liang (梁慧星), *中国民法典草案建议稿 (Zhongguo minfa dian cao'an jianyi gao)* [Proposal for the Draft of Chinese Civil Code], Law Press, Beijing, 2003; L. Wang (王利明), *中国民法典草案建议稿及说明 (Zhongguo minfa dian cao'an jianyi gao ji shuoming)* [Explanation to proposal for the Draft of Chinese Civil Code], China Legal System Press, Beijing, 2004. The latter was also published in English, *The Draft Civil Code of the People's Republic of China*, Martinus Nijhoff Publishers, Leiden and Boston, 2010.

<sup>23</sup> *中国民法典草案建议稿总则编 (Zhongguo minfa dian cao'an jianyi gao zongze bian)* [The Draft of Chinese Civil Code-General Rules], published in the website [www.iolaw.org.cn](http://www.iolaw.org.cn).

<sup>24</sup> The draft made under the direction of Prof. Sun Xianzhong, *中华人民共和国民法典民法总则专家建议稿 (提交稿) (Zhonghua renmin gongheguo minfa dian minfa zongze zhuanjia jianyi gao - tijiao gao)* [The Civil Code Draft of the People's Republic of China - General Rules, proposal by experts, to be presented to NPC] was published in the website [www.iolaw.org.cn](http://www.iolaw.org.cn).

of a draft of the first part of the Civil Code, which was prepared on the basis of his 2004 project of the Civil Code. Wang Liming's draft was approved and published on 20 April 2015 by the China Law Society<sup>25</sup>. After having received public comment this draft was submitted to the Commission of Legislative Affairs of NPC Standing Committee<sup>26</sup>.

A third draft of the first book of the Civil Code was made in 2015 by the Civil and Commercial Law Sciences Research Centre directed by Professor Yang Lixin from Renmin University. This draft, composed of 265 articles divided in 12 chapters, has been published in the Journal of Henan University of Economics and Law<sup>27</sup>.

Notwithstanding the considerable efforts lavished by scholars, the legislator made few concessions to their proposals, opting for a code-compilation approach, taking up and reworking many rules of the 1986 GPCL and of the pre-existing sectorial civil laws. The choice to stay in continuity with the previous normative path – instead of following scholars' proposals that went in the direction of a more systematic reorganization of Chinese civil law – has gone hand in hand with a stronger emphasis on local contexts, which we find since the first chapter of the law, dedicated to the basic civil law rules<sup>28</sup>.

Amongst the 12 articles of the opening chapter, alongside the protection of the rights and legitimate interests of individuals, the principles of equality, free will, justice, good faith and honesty, respect of the law and of core socialist values and the new environmentalist principles,<sup>29</sup> we first of all find the statement of the national goal of creating a “socialism with Chinese characteristics” (中国特色社会主义, *Zhongguo tese shebeuizhuyi*) which in the last few years has become one of the key words to define national identity in all fields, included the field of law. This goal finds expression, within the first chapter, in two new rules on the sources of civil law. The first is Article 8, providing that civil law subjects in civil activities must not violate laws and must not act against “public order and good customs” (公序良俗, *gong xu liang su*). The open-ended principle of the respect of public

<sup>25</sup> Lawinnovation.com, 20 April 2015, 中华人民共和国民法典民法总则专家建议稿 - 征求意见稿 (*Zhonghua renmin gongbeguo minfa dian minfa zongze zhuanjia jianyi gao - zhengqiu yijian gao*) [*The Civil Code Draft of the People's Republic of China - General Rules, proposal by experts, for public comment*]. The draft was published in the website [www.lawinnovation.com/html/13723.html](http://www.lawinnovation.com/html/13723.html).

<sup>26</sup> The draft was presented on 24 June 2015. See 中国法学会: 民法典部分分编专家建议稿已提交 (*Zhongguo faxuehui: Minfadian bufen fenbian zhuanjia jianyi gao yitijiao*) [*China Law Society: a proposal of a special Civil Code by experts has been presented*] published in the website [www.chinacourt.org/article/detail/2017/06/id/2892377.html](http://www.chinacourt.org/article/detail/2017/06/id/2892377.html). The full text of this submitted draft is accessible at [www.civillaw.com.cn/zt/t?30198](http://www.civillaw.com.cn/zt/t?30198).

<sup>27</sup> 中华人民共和国民法总则 (草案) 建议稿 (*Zhonghua renmin gongbeguo minfa zongze (cao an) jianyi gao*) [*Proposal for General Rules of Civil Law of the People's Republic of China (draft)*] was published in 河南财经政法大学学报 (*Henan caijing zhengfa daxue xuebao*) [*Journal of Henan University of Economics and Law*], 2015, pp. 24-51. Moreover, an unpublished draft was made at China's University of Political Science and Law.

<sup>28</sup> The GRCL comprise 206 articles, organized in 11 chapters: Basic provisions, Natural persons, Legal persons, Unincorporated organizations, Civil rights, Civil juristic act, Agency, Civil liability, Limitation period for litigation/statute of limitation, Calculation of time period, Supplementary provisions.

<sup>29</sup> Article 9, providing that “civil law subjects in civil activities shall follow criteria of conservation of resources and protection of the ecological environment”.

order and good customs, introduced in Chinese civil legislation as a part of the first stage of the legal transplant process<sup>30</sup> at the beginning of last century, has started to be used and “domesticated” by the Chinese courts in the last decade to mitigate strict rules, to fill in legislative gaps and, moreover, to “connect positive rules with moral convictions and social trends” thus giving expression to principles that, according to some scholars, exist in the “deep structure of Chinese Law”<sup>31</sup>. Another new rule expressing a more local-oriented approach is Article 10, which marks the official return of customs (习惯, *xiguan*) on the scene of civil law, even if within the boundaries of public order and of good customs. According to art. 10: “the resolution of civil law disputes must take place according to the law or, in the absence of legislative provisions, according to the customs, provided that these respect public order and good customs”.

These rules are expressions of the new strategy emphasizing the specificity of the Chinese legal reforms, in the framework of the “theory of rule of law with Chinese characteristics” that is one of the core issues of the 2014 CPC Resolution<sup>32</sup>. After an in-depth study of foreign legal models, as a guide for the law reform, according to the 2014 CPC Resolution China is moving in the way of an autonomous path of development, within which she “will not indiscriminately copy foreign rule of law concepts and models”<sup>33</sup>.

#### 4. The German-style code and the great civil law concepts on the background of the Chinese code

Even if distancing herself from massive practices of imitation of foreign legal models, China did not repudiate, in the codification process taken after the 2014 Resolution, the structural model of Civil Code that has represented the historical reference point for modern China, namely the *Bürgerliches Gesetzbuch*.

<sup>30</sup> In the nationalistic Civil Code of 1929-1930, Article 2 lays down the principle of the respect of public order (公共秩序, *gong gong zhi xu*) and good customs (善良风俗, *shan liang feng su*). In the GRCL the two separated expressions have been combined in one compound, 公序良俗, *gong xu liang su*.

<sup>31</sup> These are words by T. Yu, *Approaches for dealing with “natural persons” in the Chinese legal system: a statutory way and a principle way*, in *German Law Journal*, 2017, pp. 1140, 1144. In this work the author carries out a deep analysis of the prominent role of the principle of public order and good customs in courts judgement focusing on the law of persons. On the judicial interpretations of the principle of respect of public order and good customs as an expression of a specific Chinese legal identity see also C. Cai (蔡唱), 公序良俗在我国的司法适用研究 (*Gongxuliangsu zai woguo de sifa shiyong yanjiu*) [Research on the application of public order and good customs in Chinese courts], *中国法学* (*Zhongguo faxue*) [Legal science in China], 2016, p. 236; X. Zheng (郑显文), 公序良俗原则在中国近代民法转型中的价值 (*Gongxuliangsu yuanze zai zhongguo jindai minfa zhuanxing zhong de jiazhi*) [The role of public order and good customs in the evolution of modern civil law], in *法学家* (*Faxue jia*) [The Lawyer], 2017, p. 87.

<sup>32</sup> For a reconstruction of the theory of socialism with Chinese characteristics, in the law field, see M. Y.K. Woo, *Court Reform with Chinese Characteristics*, in *Washington International Law Journal*, 2017, p. 241.

<sup>33</sup> The original sentence translated in the text 汲取中华法律文化精华, 借鉴国外法治有益经验, 但决不照搬外国法治理念与模式 (*Jiqu zhonghua falu wenhua jinghua, jiejian guowai fazhi youyi jingyan, dan jue bu zhaoban waiguo fazhi linian yu moshi*) can be found in Part one of the document, at para 12.

The name of the new law, 民法总则 (*Minfa zongze*), derives from the classical distinction, adopted by Chinese legal scholarship since the beginning of the 20th century,<sup>34</sup> in the wake of the German model, between 总则 (*zongze*) and 分则 (*fenze*), were the first are the “general rules” of private law to be included in the first book of the code, and the second are “departmental rules” for specific sections of private law, to be inserted in the subsequent books on specific matters of civil law. The structure based on general-special parts was introduced in the first 1911 draft of the Civil Code and was then maintained in the 1920-30 Civil Code, remaining a staple for Chinese civil law scholars and legislators. When the 1987 GPCL was elaborated, the idea was that of it being a sort of mini Civil Code, an aggregate of 总则 (*zongze*) and 分则 (*fenze*), intended to lay the foundations of China’s new civil law for the age of reforms. For this reason the new GRCL, intended as the first book of the Chinese Civil Code to be approved within 2020, does not abrogate the 1986 GPCL. However, according to the report of the Vice President of the Standing Committee of the NPC, Li Jianguo, that accompanied the entry into force of the law, inconsistent provisions will be superseded by the provisions of the new law<sup>35</sup>.

Thus, the BGB still represents a model for the current Chinese process of civil codification. In addition to its structure, the extension of the book and part of its taxonomy bear the mark of the German model<sup>36</sup>. So it happens for several concepts – such as the concepts of personhood, natural and legal persons, legal and juristic act, real rights, property, possession, civil liability – whose origin dates back to a century ago, when, as an integral part of the reception of Western legal models, a whole new legal vocabulary was created through the technique of the formation of neologisms<sup>37</sup>.

This conceptual heritage survived the wave of legal nihilism of the Cultural revolution – having been silently preserved by the Chinese civil law scholars – and has progressively re-emerged the reform processes of the last few decades.

The re-emergence of these concepts, which today find definitive consecration in the GRCL, has been gradual in the last decades of the reforms. A good example is the central concept

<sup>34</sup> *i.e.* since the first draft of Civil Code in 1911 which, followed the general-special structure of the German Civil Code and the Japanese Civil Code, being divided into five books: general rules, contracts, property, family and succession. See Honglie Yang (杨鸿烈), *中国法律发达史 (Zhongguo falu fada shi)* [*The History of Chinese Law*], cit., p. 506.

<sup>35</sup> See Li Jianguo’s explanations on GRCL: Jianguo Li (李适时), *关于中华人民共和国民法总则 (草案) 的说明 (Guanyu Zhonghua renmin gongheguo minfa zongze (cao’an) de shuomin)* [*The explanations on the draft of GRCL*] at the website which can be read at the web address [www.npc.gov.cn/npc/xinwen/2017-03/09/content2013899.htm](http://www.npc.gov.cn/npc/xinwen/2017-03/09/content2013899.htm). According to Professor Wang Liming, “the inconsistencies shall be outlined through interpretations given by legislative organs (the expression used by WLM is “权威解释”(quanwei jieshi), literally interpretations of a public authority, which in the present case should be the legislators. See L. Wang (王利明), *中华人民共和国民法总则详解 (Zhonghua renmin gongheguo minfa zongze xiangjie)* [*The explanations of Chinese General Rules of Civil Law of China*], China legal system press, Beijing, 2017, II, p. 985.

<sup>36</sup> On the influence of the German model in the Chinese process of civil codification see H. Bernstein, *The PRC’s General Principles from a German Perspective*, in *Law & Contemporary Problems*, 1989, pp. 118-128.

<sup>37</sup> On this process see D. Cao, *Introduction to Chinese Law. A Linguistic Perspective*, Ashgate Publishing Limited, Aldershot, 2004, p. 162.

of the German civil law model, i.e. the concept of juristic act, *Rechtsgeschäft*. The juristic act, which was at the centre of 1929-30 Civil Code and is also part of the dogmatic heritage of Soviet law<sup>38</sup> to which the People's Republic was initially aligned, reappeared in the 1987 Principles, with the name of civil juristic act (民事法律行为, *minsbi falv xingwei*), flanked by the word 合法 (*hefa*), which means “lawful”, thus identifying the essence of the juristic act in its compliance with the law. According to Article 54, which opens chapter four of the GPCL, dedicated to the juristic act and agency, “A civil juristic act shall be the lawful act of a citizen or legal person to establish, change or terminate civil rights and obligations”. The juristic act, in the GPCL, is still strongly connoted in the publicistic sense, also in terms of the subjects that put it in place, which are identified in legal persons and in that category of subjects that still in the 1980s identified in Chinese civil law natural persons, i.e. the “citizens”, 公民 (*gongmin*). The concept of a natural person, in Chinese 自然人 (*ziranren*), literally “natural person”, after having been incorporated and included in the Civil Code of 1929<sup>39</sup>, disappeared in socialist China, when it was replaced by the public law concept of citizen 公民 (*gongmin*). In the GPCL we still find, in the aforementioned definition of juristic act, the reference to *gongmin*, but with the prospect of a future evolution. As a matter of fact, the second chapter of the GPCL is titled Citizens, and, right after the word citizens 公民 (*gongmin*), the expression natural persons 自然人 (*ziran ren*) is placed in brackets, as an indication of a reform process in progress. The final act of the transition from the public concept of “citizen” to the private law concept of “natural person” took place in 1999, when the Contract Law, the first of the fundamental laws that have re-shaped civil law in contemporary China, in line with the new system of “socialist market economy”, referred to *natural persons* freeing the expression from brackets. According to Article 2, para. 1, of the 1999 Contract Law, a contract is an agreement between “natural persons (自然人, *ziranren*), legal persons or other organizations” acting as “equal parties” to “establish, modify and extinguish relationship of civil rights and duties”<sup>40</sup>. The GRCL, after the first chapter where the general principles of civil law are laid down, deals with persons, eventually titling its second chapter Natural persons (自然人, *ziranren*).

<sup>38</sup> See R. Sacco, *La parte generale del diritto civile. Il fatto, l'atto, il negozio*, UTET, Torino, 2005, pp. 289-90.

<sup>39</sup> Where persons were classified, in the first chapter, into “natural persons” and “legal persons” (自然人, *ziranren* and 法人, *faren*) (section one of the book being dedicated to “natural persons”, while the second to “legal persons”).

<sup>40</sup> The People's Republic of China contract law (中华人民共和国合同法, *Zhonghua renmin gongheguo hetong fa*), has been approved on 14 March 1999, by the Nine National People's Congress. According to Article 2 of the 1999 Contract law, a contract is “an agreement between natural persons, legal persons or other organizations in equal positions, for the purpose of creating, changing or terminating a relationship of civil rights and obligations”.

## 5. Within the concepts: the rules for persons and juristic acts

Against the backdrop of a conceptual world that remains a cultural reference point within the Chinese civil law context, it is the history of the profound transformations of the last thirty years – in good part already written in the Chinese legislation – which leaves its mark on the new law.

A careful reading of the rules on persons shows this in all its evidence.

In the discipline on natural persons, on the background of a regulatory framework that focuses on the classical Western notions of capacity for civil rights and capacity for civil acts,<sup>41</sup> a series of new rules have been introduced to respond to questions spurred on by technological changes, such as the status of the foetus and the legal capacity of minors within the digital environment. The GRCL includes a provision concerning the rights of the unborn child, recognizing its capacity to inherit and its capacity to receive a gift, and subordinating the exercise of these rights to the event of birth (Article 16)<sup>42</sup>. Another new provision, Article 19, lowers the age threshold for the recognition of a limited capacity for civil acts, stating that children from the age of 8 have limited capacity through their legal designated agent or after authorization or subsequent ratification by such agent, recognizing the possibility of independently carrying out legally relevant acts that are advantageous for them or that are appropriate to the age and intellectual abilities of the child. New rules have also been designed in favour of weaker subjects that are under guardianship. For the first time, a system of control of the fulfilment of the obligations of the guardian has been established (Article 36) and a new form of protection has been introduced, on a voluntary basis, through which older people can identify a guardian for the future, that is, in the event that their capacity to act disappears. This new form of guardianship, of consensual origin, generalizes a rule previously dictated by the Law for the protection of the rights and interests of the elderly in 2015<sup>43</sup>. Today Article 33 of the *Minfa zongze* provides that any adult with full capacity to act can conclude, in writing, an agreement with natural persons or basic social organizations (first of all the Committees of the resi-

<sup>41</sup> Natural persons have the capacity for civil rights from the moment of birth to death, according to Article 13 of the GRCL, while Articles 17 and 18 recognize the capacity for civil acts to adults (18 years old persons) with full capacity for civil conduct.

<sup>42</sup> A provision about protection of the unborn child could be found only Article 28 of Succession Law. However a growing debate has developed moving from some judicial decision, as Nanyang Intermediate people's court (2010) (河南省南阳市中级人民法院, *Henan sheng Nanyang zhongji renminfayuan*), 南召马民初字第 005 号, *Nanzhao ma min chu zi No. 005*. This case can be read at the following web address: [www.pkulaw.cn/case](http://www.pkulaw.cn/case). For a broad reflection on this topic see T. Yu, *Approaches for Dealing with the "Natural Person" in the Chinese Legal System: A Statutory Way and a Principled Way*, in *German Law Journal*, 2017, pp. 1121-1144.

<sup>43</sup> The People's Republic of China Law for the Protection of the Rights and Interests of the elderly (中华人民共和国老年人权益保障法, *Zhonghua renmin gongheguo laonianren quanyi baozhang fa*), was approved on 29 August 1996 and revised on 24 April 2015.

dents both of the urban districts and of the villages) for future guardianship. The reason for this provision is a new social emergency linked to the effects of birth planning, i.e. the emergence of old people who are left without relatives. This theme is a very critical issue in a country that sees the principle of filial piety and the care for the elderly among the identifying principles of its thousand-year-old cultural history<sup>44</sup>.

The legislators have also chosen to place their imprint on the rules on legal personhood, introducing a new classification and not following the indications of the scholars who referred to the taxonomy of the BGB<sup>45</sup>. The General part of civil law classifies legal persons in three categories, i.e. legal persons for profit (营利法人, *yingli faren*), non-profit legal persons (非营利法人, *fei yingli faren*) and special legal persons (特别法, *tebie faren*). Non-profit legal persons cannot distribute profits to founders, investors or members (Article 87) and are identified by law in organizations that perform social services (社会服务机构, *shehui fuwu jigou*), in foundations (基金会, *jinbui*), in public institutions (事业单位, *shiye danwei*) that pursue aims of public interest (Article 88) as universities, hospitals, research institutes.

An important innovation concerns the introduction of the category of special legal persons, which attributes, for the first time, personhood to institutions that have always been protagonists of Chinese economic and social life and that have undergone significant changes, related to the reforms of the last decades, in their roles and functions. These are the Committees of urban residents (居民委员会, *jumin weiyuanhui*) and rural committees (村民委员会, *cunmin weiyuanhui*) and, above all, rural collective economic organizations (农村集体经济组织, *nongcun jiti jingji zuzhi*) that, pursuant to Article 10 of the Land Administration Law<sup>46</sup>, exercise rights on collective ownership (集体所有权, *jiti suoyouquan*), and in particular the rights of land use for residential purposes (宅基地使用权, *zhaijidi shiyongquan*) (Article 153), which are a fundamental component of the Chinese real estate market in rural areas<sup>47</sup>. The recognition of legal personhood to these organizations is a fundamental step towards a clearer definition of their rights and responsibilities, in particular with reference to the numerous critical issues which have emerged in the management of land use rights by collective organizations in the last few decades and which

<sup>44</sup> See L. Yang (杨立新), 民法总则对民法基本规则的成功改革及成因 (*Minfa zongze dui minfa jiben guize de chengong gaige ji chaengyin*) [*The success of the General rules of civil law in the reform of the fundamental rules of civil law*], in 法治研究 (*Fazhi yanjiu*) [*Research on Rule of Law*], 2017, p. 5.

<sup>45</sup> Both in the draft made by the CASS group under the direction of Sun Xianzhong and in the draft realized under the direction of Wang Liming, legal persons are classified into 社团法人, *she tuan faren* and 财团法人, *cai tuan faren*, where the two terms are translations of the BGB classification of legal persons in *Verein* and *Stiftung*. See the two projects, above, in footnotes 24 and 26, respectively at Articles 92-106 and Articles 72-90.

<sup>46</sup> Land administration law: 土地管理法, *Tudi guanli fa* (1986).

<sup>47</sup> Land, as a public good, owned by State and collective organizations, cannot be transferred, while the commercial transfer of land use rights is allowed. The rule of transferability of land use rights was introduced in 1988, amending article 10 of the Chinese Constitution, in order to meet the emerging real estate demand in the framework of the huge development of the Chinese economy.

have resulted in several episodes of social unrest and in the huge growth of civil litigations in this field<sup>48</sup>.

The other section of the GRCL that appears to be more closely linked to the general part of the BGB, namely the one dedicated to the juristic act, also presents numerous distinctive features in respect to the German model, primarily in its regulatory framework, which remains set on that of the GPCL. Within this framework, however, significant changes compared to the pre-existing discipline have been made, moving from a public law oriented discipline to a private law one. If in the GPCL the civil juristic act was defined as a legitimate act (合法行为, *hefa xingwei*) of citizens or legal entities to constitute, modify or extinguish rights and obligations (Article 54), the new law only speaks of the civil juristic act 民事法律行为, *minshi falv xingwei*, eliminating any reference to its necessary legitimacy and shifting the centre of gravity of the definition on the elements of the manifestation of will (意思表示, *yisi biasoshi*) and legal relationships (法律关系, *falv guanxi*): “The juristic act is an act in which the civil subjects constitute, modify, extinguish legal relations through a manifestation of will” (Article 133).

The manifestation of will, the new protagonist of the juristic act, can be bilateral, multilateral or unilateral (Article 134). With regard to the form of the juristic act, Article 135, reproducing Article 10 of the Contract law, provides that “Civil juristic acts may employ written, oral, or other forms; where a specific form is provided for in laws or administrative regulations, or where the parties have agreed on a specific form, that form shall be employed”. A specific rule for contracting by electronic means has been introduced, specifying that if the recipient has established a specific system, the declaration of will becomes effective at the time in which it enters the recipient’s electronic system (e-mail, voice message) (Article 137); where a specific system has not been designated, the digital data document takes effect when the counterpart knows or should know that it has entered their system (Article 137). A new rule regarding silence, in Article 140, states that silence may only be viewed as a manifestation of will as provided by law, as agreed upon by the parties, or where it conforms with the custom of transactions between the two parties. The provision dedicated to the interpretation of the manifestation of will, providing that it must be based on expressions used in combination with the relevant terms, the nature and purpose of conduct, customs and the principle of good faith (Article 142), reproduces a rule already stated in Contract Law (Article 125).

The legislators have also introduced new rules regarding effectiveness and validity, starting from the enunciation of the conditions for the validity of a civil juristic act, which are al-

<sup>48</sup> The main problem was in the very low amount of the compensation given to peasants for land use rights sold at a very high price. See, on this crucial issue that will be further investigated in the last paragraph of this work, X. Chen (陈小君), 农村集体土地征收的法理反思与制度重构 (*Nongcun jiti tudi zhengshou de falv fansi yu zhidu zhong gou*) [Reflection on the legal and institutional reorganization of the expropriation of rural collective land], in 中国法学 (*Zhongguo faxue*) [Legal Science in China], 2012, pp. 33-44.

ways three, as in the GPCL, but with a differentiation, due to the introduction, also in this section, of the open-ended principle of the respect of public order and good customs that has already been mentioned as a new leading hermeneutical key for Chinese courts. As a matter of fact, while confirming the two first requirements of the capacity for civil conduct and the authenticity of the declaration of will, the third condition of the “compliance with the law and the public interest” of Article 55 of the Principles has become, in Article 143 of the GRCL, the “compliance with mandatory provisions of laws or administrative regulations, public order and good customs”.

The causes of voidness of the juristic acts are represented by the absence of legal capacity (Articles 144 and 145), by the existence of simulation, in cases where this is expressly relevant pursuant to law provisions (Article 146), by the violation of mandatory provisions of law or administrative regulations or violation of public order and good customs (Article 153), by the common intent of the parties to infringe rights and interests of third parties (Article 154). The causes of voidability are: significant mistake (Article 147), fraud (Article 148), duress (Article 150), induction, taking advantage of conditions of weakness of the other party to conclude a clearly unfair juristic act (Article 151).

With respect to conduct marked by a common malicious intent of the parties detrimental to the interests and rights of third parties it should be noted that under the law on contracts there was only reference to the damage to the interests of the State (Article 52 n. 1). The GRCL, by generically referencing third parties, places the State and private subjects on the same level in regards to this cause of nullity<sup>49</sup>.

## 6. A typical feature of the General part of civil law: the chapters on civil rights and civil liability

Analogously to the GPCL, the first book of the Chinese Civil Code devotes two chapters (V and VIII) to civil rights and civil liability, which are presented as a typical feature of the Chinese experience with respect to the great models of the Civil Code. In this regard the historical role of the chapter on civil rights that in the GPCL established a sort of “declaration of rights” (权利宣言, *quanli xuanyan*)<sup>50</sup>, which has been renewed and strengthened with the GRCL, is outlined.

It is in this chapter we find the rights of the personality (人格权, *renge quan*), which in recent years have been at the centre of a heated doctrinal debate regarding the issue of

<sup>49</sup> See L. Yang, *cit.*, 2017, p. 9.

<sup>50</sup> These are words by the Vice President of Standing Committee of NPC, Jianguo Li (李适时), 民法总则是确立并完善民事基本制度的基本法律 (*Minfa zongze shi queli bing wanshan minshi jiben zhidu de jiben falu*) [*The General rules of civil law, a fundamental law for the system of civil law*] which can be found at the following web address: [www.npc.gov.cn/xinwen/lfgz/lfdt/2017-04-14/content\\_2019846.htm](http://www.npc.gov.cn/xinwen/lfgz/lfdt/2017-04-14/content_2019846.htm).

the opportunity to make it the object of a specific discipline, with an *ad hoc* book, within the code<sup>51</sup>. The legislator's choice was to include these rights in the opening of the chapter on civil rights, thus not establishing a general right of personality, as part of the Chinese doctrine had proposed, but by enunciating a list of rights: the right to personal freedom, to dignity (Article 109), to life, to the integrity of the body, to health, to one's name, to one's image, to reputation, to honour, to privacy, to marital liberty (Article 110), the right to the protection of personal information (Article 112). However, the central role of personality rights in the new Civil Code is well represented by the fact that in the last draft of the code published on 5 September 2018 by the Standing committee of the National People's Congress, there is a specific book on personality rights<sup>52</sup>.

The articles dedicated to the rights of personality follow, in the chapter on civil rights, the basic rules on civil rights, credit rights (arising from contract, torts, unjust enrichment, *negotiorum gestio*), property rights, intellectual property rights, inheritance rights, data protection and virtual property rights. In most cases, the rules reproduce principles already established by previous legal texts (such as the principle of the binding force of contracts in Article 119, the general principle of tort liability in Article 120, the definition and the principle of *numerus clausus* of real rights in Articles 114 and 115)<sup>53</sup> or elaborated in the doctrinal context (the distinction between legal facts, legal acts, and juristic acts<sup>54</sup> that is found in Article 129). A novelty is represented by the provision in Article 127, which refers to data protection (数据, *shuju*) and virtual property (网络虚拟财产, *wangluo xuni caichan*); this Article states that "Where any laws provide for the protection of data and network virtual property, such laws shall apply". As far as data are concerned, Article 127 is still a very general and nominal provision, since it does not stipulate the definite meaning and the specific extension of the protected data. However, it has its own relevance as there is no law or regulation specifically related to data, but quite a number of legal documents in close connection to data protection<sup>55</sup>. With regards to virtual property, the GRCL enshrines its first formal entry into the legislative field, as it was previously only mentioned

<sup>51</sup> For a reconstruction of the terms of the debate see C. Lei, *Debating Personality Rights in China: a comparative outlook*, in *European Review of Private Law*, 2018, pp. 31-56.

<sup>52</sup> See the Draft of the Special parts of the Civil Code (民法典各分编草案, *Minfadian gefenbian cao'an*), published on the website: www.npc.gov.cn.

<sup>53</sup> We find these principles in Article 8 of Contract law, Article 3 of Tort Law, and Article 5 of Property Law.

<sup>54</sup> The distinction, following the German model, is present in all classical civil law handbooks. See e.g. P. Jiang (江平), *民法学 (Minfaxue) [Civil Law]*, China University of Political Science and Law Press, Beijing, 2000; Weiqiu Long (龙卫球), *民法总论 (Minfazonglun) [General Theories of Civil Law]*, Chinese Legal System Press, Beijing, 2002.

<sup>55</sup> If we adopt a broad concept of data, it could be found that there has already been fragmented but abundant legislation on data protection in China, starting from what is considered the first national act on data protection, *i.e.* The Decision of the Standing Committee of the National People's Congress on Preserving Computer Network Security (全国人民代表大会常务委员会关于维护互联网安全的决定, *Quanguo renmin daibao dabui changuu weiyuanhui guanyu weibu bulingwang anquan de jueding*), adopted on 28 December 2000, revised on 27 August 2009, to the Cybersecurity Law of the People's Republic of China (中华人民共和国网络安全法, *Zhonghua renmin gongheguo wangluo anquan fa*) adopted on 7 November 2016. Since the draft of the Law on Protecting Personal Information is still under discussion,

in an act of the Ministry of Industry and Information Technology<sup>56</sup>. While the consideration shown by the GRCL for these last subjects is worthy of note, we should observe, at the same time, that, due to the vagueness of the provision and its drafting process, a considerable uncertainty still surrounds the subjects, starting from the question of how they are framed in the new law. The draft of the GRCL published in July 2016 for public comments dealt with virtual property separately from the data. The draft placed virtual property in the rule dealing with the definition of things (物, *wu*), stating that “things include immovables and movables. If rights or network virtual property are the objects of any real rights in accordance with any laws, such laws shall apply”<sup>57</sup>. In the final text virtual property was moved to the end of the section dedicated to civil rights with an *ad hoc* provision in which, as we have seen, the concept of virtual property does not appear on its own, having been associated, with difficult to decipher logic, with the notion of data.

Chapter V was, perhaps more than others, a matter of confrontation between the legislators and the civil law scholars who pointed out the declamatory approach, with very few operational implications, of this part of the new law<sup>58</sup>. The projects of the first book of the Civil Code that some of the leading exponents of the Chinese civil law scholarship had elaborated in view of the drafting of the General Part of Civil Law, had all proposed a reorganization of this chapter, focusing on the “objects” of rights or of civil relationships and inserting provisions on the so-called new properties<sup>59</sup>.

A considerable divergence also separates the doctrine projects from the *Minfa Zongze* text for the chapter on civil liability (Chapter VIII), absent as an independent chapter in the projects of Wang, Liang and Sun, which regulates the responsibility that results from the performance of an obligation imposed by law or arising from the agreement between the parties (Article 176).

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Chapter IV of the Cybersecurity Law is the most detailed law in force on the specific requirements of personal information protection in China.

<sup>56</sup> The Notice of the Ministry of Industry and Information Technology on Printing and Distributing the Special Action Plan for Preventing and Administering Hackers' Underground Industry Chain (工业和信息化部关于印发防范治理黑客地下产业链专项行动方案的通知, *Gongye he xinxi bua bu guanyu yinfa fangfan zhili beike dixia chanye lian zhuanxiang xindong fang'an de tongzhi*, issued on 30 July 2013), provides that the corresponding authorities (the National Computer Network Emergency Technology Processing Coordination Center and the China Internet Society) should “strengthen monitoring the information of online sales of (...) virtual property (...) analyze the beneficiaries of hacker activities, and establish relevant reporting mechanisms”.

<sup>57</sup> See Article 104 of the draft, which can be read at the following web address: [www.npc.gov.cn/npc/flcazqyj/2016-07/05/content1993342.htm](http://www.npc.gov.cn/npc/flcazqyj/2016-07/05/content1993342.htm).

<sup>58</sup> See Y. Li (李永军), *民法总则民事权利章评述 (Minfa zongze minshiquanli zhang pingshu)* [Comments on the chapter of civil rights of *Minfa Zongze*], in *法学家 (Faxue jia)* [The Jurist], 2016, pp. 65-66; Jinqiang Ye (金强), *民法总则民事权利章的得与失 (Minfa zongze minshiquanli zhang de deyu shi)* [The gains and losses of chapter “Civil Rights” of *Minfa Zongze*], in *Peking University Law Journal, Chinese and Foreign Law*, 2017, pp. 647-648.

<sup>59</sup> The chapters have different names: “Objects of civil rights (民事权利客体, *Minshiquanli keti*)” in the draft by W. Liming and “Objects of rights (权利客体, *Quanli keti*)” in the draft by Liang Huixing, and, lastly, “Objects of legal relationship (法律关系客体, *Falu guanxi keti*)” in the draft by Yang Lixin.

This chapter is quite short, mostly reproducing principles stated in the 2009 Tort law – with the insertion of a few new rules – and, not so differently from the Tort law, which was elaborated “grounding on civil law while absorbing common law”<sup>60</sup>, it is marked by a certain degree of hybridization that appears from the first new provisions inserted within it. The first is the rule, inspired by the “good samaritan immunity clause” of American law<sup>61</sup>, provided in Article 184 (“The rescuer, who in the course of an emergency assistance action, causes damage to the person receiving assistance, must be considered exempt from liability”); the second provision – in which the national values are placed in the foreground – is “those who damage the name, reputation, honour of national heroes and martyrs of the homeland must be liable for damages, damaging the public interest of the company” (Article 185).

The centre of the discipline is represented by a long article that deals with remedies and includes an articulated list of twelve remedies, some of them already present in the 1987 Principles and in the 2009 Tort Law. Amongst them, we also find punitive damages, whose inclusion in this general provision had long been debated, several scholars being sceptical about the generalization of this type of damages that had been imported from common law into the Tort law<sup>62</sup>. The final decision of the legislators was to insert this category of damages “where the law provides for them”. The remedies listed in Article 179 are the following: cessation of the act of violation, removal of the obstacles, elimination of the dangers, return of the goods, restoration of the original state or condition, repairs, reconstruction or replacement, continuation of the fulfilment, compensation for damages, payment of expenses incurred, the elimination of negative impacts and the restoration of reputation, the apologetic request, the payment of punitive damages.

## 7. Final remarks: Western models, Chinese Characteristics and beyond

In the long-lasting project of the codification of Chinese private law the German model still plays a leading role as far as the structure of the code and the core component of its conceptual framework are concerned. However, the history summarized in the previous paragraphs outlines a picture of growing complexi-

<sup>60</sup> L. Yang (杨立新), *侵权责任论 (Qinquan falun) [A Study on Tort Law]*, Press of People’s Court, Beijing, 2011, p. 144.

<sup>61</sup> We find a first acknowledgement of the rule in case law. See Guangzhou Intermediate People’s Court (2014) 广东省广州市中级人民法院 (*Guangdong guangzhou zhongji renminfayuan*, (2014), 穗中法金民终字 742 号 (Sui zhong fa jin zi min zhong zi No.742). This case can be read at the following web address: [www.pkulaw.cn/case](http://www.pkulaw.cn/case).

<sup>62</sup> See Y. Song (宋义欣), *惩罚性赔偿不宜纳入民法典的思考 (Chengfa xing peichang buyi naru minfa dian de sikao) [Reflections on the non-incorporation of punitive damages in the Civil Code]*, in 黑龙江省政法管理干部学院学报 (*Heilongjiang sheng zhengfa guanli ganbu xueyuan xuebao*) [*Journal of Heilongjiang Administrative Cadre Institute of Politics and Law*], 2017, pp. 61-64.

ty of the Chinese contemporary legal system in the context of an increase of the circulation of legal models and of a process of contamination between them. In this process we observe the different legal formants reacting in different ways, the scholars being more influenced by foreign legal models in their code projects, while the legislators follow a more “domestic oriented” approach, stressing the distinctiveness of Chinese private law within the conceptual framework derived from civil law models. If, on the one hand, this emphasis on the local legal factors is linked to the specific and profound transformations of the Chinese economic, social and legal landscape in the last few decades, on the other hand it is strictly connected to a new political strategy, written in the first CPC Party’s resolution solely dedicated to the topic of law, where the CPC announced that, after having studied foreign models in other countries for the last thirty years, “a more powerful and assertive China is now emphasizing that it will follow its own development path to legal reforms”<sup>63</sup>.

Moreover, in the complex game of contaminations between foreign and local models that marks the current making of the Chinese Civil Code, we should not forget other legal formants, i.e. the courts and the action of the deeper levels of the local legal substratum, where cultural patterns are at work. The GRCL also introduces, in the Chinese Civil Code, some catch-all principles that, after having entered the Chinese legal system as part of a legal transplant packaging, in the last few decades have been living, at least partially, a life of their own within the context of local legal mentality and local legal processes, mainly due to the work of the courts. This is the case of the concept of “public order and good customs”, which, as we have seen, has been widely used and elaborated on by Chinese courts to mitigate strict law rules or to fill in legislative blanks and pursue justice on a case-by-case basis and which has been later inserted in several provisions of the first book of the Civil Code. This is also the case of another key general concept with which the Chinese courts have been working since the very beginning of the law reforms and that seems to be even more connected to the cultural roots of the Chinese legal tradition. The concept is that of 合理 (*beli*)<sup>64</sup> which is translated into English as “reasonable, reasonableness” and entered the Chinese private law, first of all in the 1999 Contract law, as a result of the influence of foreign models, especially the uniform law models. In the last two decades this legal concept has been increasingly used in judicial discourses, often in association with the word 公平 (*gongping*)<sup>65</sup>, which has the meaning of

<sup>63</sup> M. Y.K. Woo, *cit.*, p. 257.

<sup>64</sup> Where 合 *he* means to “suit”, “agree”, “join”; and 理 *li* means “reason”, “principle”.

<sup>65</sup> The latter compound consists of the character 公 *gong*, meaning “public”, “common”, “equitable” and of the character 平 *ping* which means “fair”, “equal”.

“fair”. The combination of the two compounds gives rise to the expression 公平合理 (的) *gongping heli (de)*, which is usually translated as “reasonable and fair” or “reasonably fair”.

Within the Chapter on civil rights of the GRCL, in the section on property rights, one of the most relevant new provisions is Article 117, about the expropriation for public utilities. According to this provision “fair and reasonable” (公平合理, *gongping heli*) compensation shall be provided to those who undergo procedures of expropriation.

A close examination of the process that eventually led to the insertion of the 公平合理 (*gongping heli*) standard in Article 117 allows important elements that better frame the GRCL to emerge. It should first of all be remembered that the procedures of expropriation – which are of two kinds, i.e. expropriation of rural lands and expropriation of houses on state-owned land – are one of the most critical issues of the Chinese economic and legal reform<sup>66</sup>, having given rise to several episodes of social unrest and a huge number of lawsuits, one of the most crucial aspects being that of the very low amount of compensations. Chinese law referred to the right to a compensation in expropriation for public utilities both in the text of the Constitution (Article 10) and of the Real right law (Article 24). However, these provisions still left the problem of finding an appropriate standard to calculate compensation unsolved, a complicated issue given the specific Chinese market situation in which these procedures take place<sup>67</sup>. Thus, facing several cases of expropriation of rural lands whose land-use right were sold at a very high price on the market against very low compensations paid to farmers, the courts, from 2014, started creating criteria to calculate compensation according to a standard of “fairness and reasonableness” 公平合理 (*gongping heli*)<sup>68</sup>. This standard, after having been adopted in several judgments, entered a common document issued by the 2016 CPC Central Committee and State Council, i.e. the ‘Opinions on Improving the System of Property Right Protection and the Protection of Property Right’<sup>69</sup> and subsequently into the

<sup>66</sup> For an overview of the history of expropriation in the last decades see C. Wang, *The Constitutional Protection of Private Property in China*, Cambridge University Press, Cambridge, 2016.

<sup>67</sup> X. Chen, *cit.*, pp. 33-44.

<sup>68</sup> See, amongst the others, Shandong Higher People’s Court (2014), (山东省高级人民法院, *Shandong sheng gaoji renmin fayuan* (2014)); Henan Higher People’s Court (2016) (河南省高级人民法院, *Henan sheng gaoji renmin fayuan* (2016)); Yuxing End No. 811 Second Judgment Administrative Judgment (2016) (豫行终 811 号二审行政判决书, *Yu xing zhong 811 hao ershen xingzheng panjueshu* (2016)); Wuhan Intermediate People’s Court, Wuhan Zhongxing Chuzi No. 00170 (2015) (武汉市中级人民法院, 鄂武汉中行初字第 00170 号, *Wuhan shi zhongji renmin fayuan, wuhan zhongxing chu zi No 00170* (2015)). These cases can be read at the following web address: [www.wenshi.court.gov.cn](http://www.wenshi.court.gov.cn)

<sup>69</sup> The Opinions (中共中央国务院制定关于完善产权保护制度依法保护产权的意见, *Gong zhongyang guowuyuan zhiding guanyu wanshan chanquan baohu zhidu yifa baohu chanquan de yijian*), published on 11 April 2016, can be read on the website: [www.gov.cn/zhengce/2016-11/27/content\\_5138533.htm](http://www.gov.cn/zhengce/2016-11/27/content_5138533.htm).

‘Opinions on Giving Full Play to the Role of the Judgements and Strengthening the Judicial Protection for Property Rights’<sup>70</sup> issued by the Supreme People’s Court, where point 10 stressed that the principle of timely and reasonable compensation should be adhered to. Finally, the standard arrived into the law as the Chinese legislator introduced it into Article 117 of the GRCL.

This is not the first time that Chinese courts, of their own initiative, in the absence of any previous statutory provision, resort to this standard as a decisional element to make up for the gaps of legislation, especially in very convoluted cases<sup>71</sup>. Moreover, previous researches have highlighted that the legal concept of 合理 (*beli*) is deeply embedded in the Chinese legal tradition, representing, in the legal discourses of late Imperial China, a well-rooted balancing standard, founded on the evaluation of the specific circumstances of each case, for settling legal decisions in highly intricate cases<sup>72</sup>.

The brief reconstruction of the courts’ resort to 公平合理 (*gongping beli*) and of the entry of the standard into the first book of the Civil Code not only gives us an inside glimpse into the making of the Civil Code from the perspective of the law in action, outlining the role of the courts in the process of civil codification, but also bring us into the hidden dimension of latent ideas in the interpreters’ legal mentalities that impinge on the operative aspects of the legal rules. This dimension, which goes well beyond the official rhetoric of Chinese characteristics, still needs to be studied in depth as a part of the current process of codification of Chinese civil law, a process where, as emerged from this first reading, flow also standards and principles that trigger a chain of references at the end of which there are rules of cultural origin.

When the Civil Code was introduced in China, at the dawn of the modern legal reforms, the local aspects were considered only in the perspective of a Western-style imagined future. Today, one century later, the local dimension has been acquiring increasing consistency, in terms of more openly declared political strategies on the part of the Chinese leaders, of rules shaped by specific local needs and, last but not least, of the transmission of cultural patterns deeply rooted in the Chinese legal mentality. These local factors are combined with the imported rules and legal categories as a result of a selective practice of

<sup>70</sup> The SPC Opinion (最高人民法院发布关于充分发挥审判职能作用切实加强产权司法保护的意見, *Zuigao renmin fayuan fabu guanyu chongfen fabui shenpan zhineng zuoyong qieshi jiaqiang chanquan sifa baohu de yijian*) was published on 29 November 2016 and it can be read at the website: [www.court.gov.cn/fabu-xiangqing-31771.html](http://www.court.gov.cn/fabu-xiangqing-31771.html).

<sup>71</sup> M. Timoteo, *Vague notions in Chinese contract law: the case of Heli*, in *European Review of Private Law*, 2010, p. 939.

<sup>72</sup> J. Bourgon, *Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing*, in *Law Imperial China*, 2002, p. 60.

borrowings made through both explicit choices and implicit cultural processes giving rise to a growing legal hybridity.

The upcoming special books of the Civil Code will help us understand the dimension this hybridity will assume in the different sectors of civil law.